Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	**CG Docket No. 02-278**
Telephone Consumer Protection Act of 1991	)	**CC Docket No. 92-90**
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COMMENTS AND RECOMMENDATIONS
OF THE ATTORNEYS GENERAL OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, GUAM, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING,
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AND THE HAWAII OFFICE OF CONSUMER PROTECTION

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COMMENTS AND RECOMMENDATIONS OF THE ATTORNEYS GENERAL

I. INTRODUCTION AND SUMMARY

We, the undersigned Attorneys General, submit these Comments in connection with the Federal Communication Commission's review of the rules it adopted in 1992 ("TCPA Order") implementing the Telephone Consumer Protection Act of 1991 ("TCPA"), as requested in the Commission's Notice of Proposed Rule Making ("NPRM") issued on September 18, 2002 and published in the Federal Register on October 8, 2002.[1]

The primary purpose of these Comments is to address the key issues related to a "do-not-call" registry and to respond to some of the specific questions raised by the Commission in its NPRM. We realize the Commission has reviewed the comments submitted to the Federal Trade Commission by the Attorneys General of all fifty states, the District of Columbia, and three territories regarding the FTC do-not-call proposal (NPRM ¶63).[2] These Comments will repeat some of the points made in that submission, and directly address some of the issues raised in the Commission's NPRM.

The undersigned Attorneys General support the establishment by the Commission of a non-preemptive do-not-call registry. We support efforts of the Commission to work cooperatively with the Federal Trade Commission and the states in the administration of a database so that consumers can register once for inclusion in FCC, FTC, and state do-not-call registries. We also support efforts to share information on complaints from consumers regarding alleged violations of do-not-call laws. But we strongly oppose any effort to invade the sovereign power of the states by purporting to preempt any existing or future state do-not-call laws.

Thus, under the arrangement we advocate, effective do-not-call enforcement would be accomplished by three groups working together for consumers: the FCC, the FTC, and the states.

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[1] Citations to NPRM paragraphs herein refer to the full-text NPRM on the Commission's website, rather than the summary published in the Federal Register.

[2] The territories that joined the FTC submission were the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. References to "states" herein include the District of Columbia and territories. References to Attorneys General include the Corporation Counsel of the District of Columbia and the Hawaii Office of Consumer Protection.

A consumer could register once by contacting the FCC, FTC, or the consumer's state do-not-call registry (assuming state law authorized the sharing of registry information). A consumer should be able to file a complaint with any of the three agencies, and complaint information would be available for sharing among the agencies as appropriate and when permitted by state law. The agencies could determine, for instance, whether a call implicated the TCPA (FCC enforcement) or the Telemarketing and Consumer Fraud and Abuse Prevention Act (FTC enforcement), and the consumer's state Attorney General's office could determine whether there was a potential violation of that state's do-not-call law. It would not be necessary for the consumer to determine which laws were implicated. State officials would have a choice on enforcement. They could (1) enforce a violation of the TCPA in federal court as provided by the TCPA, (2) bring an action in state court if that violation were also a violation of state law, or (3) bring a TCPA action in federal court and include a state law claim under the court's supplemental jurisdiction authority, assuming the conduct violated the TCPA and state law. Conduct that violated only state law would be brought in state court. The FCC and FTC could bring suits to enforce their own laws as well.

We cannot stress enough that the Commission should not attempt to usurp state authority and purport to strip states of the power to enforce laws that the people of the states, through their elected representatives, have determined were appropriate to protect the privacy of the people in their homes.

As enforcement partners of the Commission, the Attorneys General support the efforts of the Commission to improve upon the protections of the TCPA Order for our common constituents: the consumers. We urge the Commission to continue to keep the interests of consumers paramount as it considers these and other Comments, and we look forward to further cooperative efforts to protect the people of this country from fraud and to preserve their right to privacy in their homes in accordance with the purpose of the Telephone Consumer Protection Act of 1991.

II. PROPOSAL OF A DO-NOT-CALL REGISTRY

A. OVERVIEW

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property. . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Rowan v. United States Post Office Dep't, 397 U.S. 728, 737 (1970) (internal citations omitted).

Unwanted telemarketing calls interrupt the private lives of millions of Americans. The Attorneys General applaud the Commission for revisiting its prior orders in light of more recent developments and the public outcry for improved protection against these abusive and pervasive intrusions into homes by uninvited telemarketers. Since the late 1980's, when several states began

studying these problems, state legislatures have responded to the increasing demand for privacy by enacting their own do-not-call legislation. Recent legislation creates centralized registries ("do-not-call" or "no-call" lists) in which residents may register their home telephone numbers, and, once done, these registries bar telemarketers from placing calls to those registered numbers. Today, at least 19 states have do-not-call database systems in place, and an additional six states are presently implementing systems.[3] More state legislatures have been considering such systems.[4] Public support of these do-not-call database systems has been overwhelming, and with good reason: they work.[5]

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[3] Alabama, Arkansas, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Missouri, New York, Oregon, Pennsylvania, Tennessee, Texas, Vermont, and Wyoming have do-not-call database systems in effect. California, Illinois, Louisiana, Massachusetts, Minnesota, Oklahoma, and Wisconsin are presently implementing database systems. The Massachusetts statute becomes effective January 1, 2003.

[4] Legislation proposing do-not-call database systems has been offered during recent legislative sessions in Alaska, Arizona, Iowa, Maryland, Michigan, New Jersey, Ohio, Rhode Island, South Dakota, Virginia, and Washington.

[5] The Commission observed that do-not-call registries are popular (NPRM ¶9). Public enthusiasm shows no sign of waning. For example, in the State of Indiana, more than 1,000,000 residential telephone numbers have been submitted to the State's do-not-call list. In Missouri, more than 1,000,000 residential telephone numbers are now enrolled in the State's do-not-call database, placing approximately 40% of the State's households on that State's do-not-call list. In Tennessee, 762,000 telephone numbers have been registered, representing an estimated 33% of all households. In New York, the number of residential telephone numbers enrolled on that State's do-not-call list is nearly 2 million. Connecticut's do-not-call list contains nearly 400,000 telephone numbers, and Georgia's

In each state that has enacted a do-not-call database system, and in many states now considering such a measure, some members of the telemarketing industry have attempted to erect barriers and raise obstacles to thwart the enactment of such a system or to reduce its effectiveness. This pertains to the issue of consumer privacy. The ability to keep uninvited marketers out of one's home is an issue of consumer sovereignty and autonomy -- as fundamental as the ability to ward off door-to-door peddlers with a "No Trespassing Sign."[6] No marketer has an inalienable right under the First Amendment, or any law, to intrude when uninvited -- or when expressly forbidden -- into the kitchens and living rooms of American families.

In the case of telemarketing, the marketer uses the property of the consumer -- the telephone -- in the consumer's own home, adding elements of both trespass and conversion when the telemarketer intrudes without permission.

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is nearing 360,000. Colorado has 977,000 registered phone numbers, almost half of the number of residential phone lines in the state. Texas has more than 782,000 registered phone lines. Kentucky has 740,000 registered phone lines, representing 46% of Kentucky residents. The Kansas list contains more than 397,000 phone lines. Approximately 1,600,000 residents enrolled in Pennsylvania's registry in less than six weeks.

[6] *National Federation of the Blind v. Pryor*, 258 F.3d. 851, 855 (8th Cir. 2001) ("The State has a well-recognized interest in protecting a citizen's ability to cut off unwanted communications entering the home.")(citing *Hill v. Colorado*, 530 U.S. 703, 717 (2000); *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). *See also Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988); *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943).

Under the company-specific notification system currently required by the TCPA Order, every marketer engaged in telemarketing remains able to call any household *unless and until* the telemarketer is directly told by that consumer not to call again. Thus, consumers currently may be interrupted at least once from their private lives by every telemarketing seller in the country. Consumers are placed at the terrific disadvantage of often not knowing the identity of telemarketers and whether they represent the same company, or a similar-sounding company, as the telemarketer to whom they may have given notice the month before. This system has proven inadequate because it leaves the consumer entirely dependent on telemarketers to identify their business meaningfully, to interpret correctly the consumer's request not to be called again, and then to comply with that request.[7] The creation of do-not-call databases empowers consumers to choose, *in advance*, whether they wish to receive these contacts in their homes. The Attorneys General believe that the company-specific do-not-call approach adopted by TCPA Order is, standing alone, ineffective. The Attorneys General do believe the company-specific lists should be retained along with a national do-not-call registry to maximize choice for consumers who want to receive some telemarketing calls.

While the Attorneys General applaud the Commission's inquiry regarding the establishment of a do-not-call database system to protect consumer privacy, we have several concerns with the way in which such a system would be implemented. Our most fundamental concern is how a national registry would work in conjunction with do-not-call database systems established or being implemented by the states. To the extent that the Commission would establish a system that supplements the states' efforts, and does not supplant the protections state laws afford their residents against unwanted calls from out-of-state and in-state telemarketers, the Attorneys General are hopeful that a registry will be established by the Commission. We are hopeful that the Commission's registry would further enhance consumers' right to privacy. Our other concerns relate to the details of developing a national system and are based upon (1) the extensive experience the states have had in implementing such laws, and (2) the special insight of the Attorneys General into consumer concerns as a result of the fact that the Attorneys General, as representatives of the residents of their respective states, are "often closer to consumers' actual experiences and problems, and learn of difficulties first."[8] We hope that the Commission may benefit from our experiences and

[7] The current system offers consumers who do not wish to receive calls the "choice" of disconnecting their telephone or "screening" all calls through their own answering machine (which, for most common models, results in hearing the phone ring, one's own answering machine greeting, and then either the telemarketer's message or the ensuing silence when the telemarketer's predictive dialer hangs up). Many voice mail systems offer no such "screening" ability.

[8] Testimony of Eileen Harrington, Associate Director, Division of Marketing Practices, Federal Trade Commission, before the Kentucky Senate Judiciary Committee, February 6, 2002.

knowledge. We reiterate our desire to work with the Commission to ensure that any system the Commission may adopt in this rulemaking process will satisfy our mutual interest in ensuring that consumers' privacy interests are paramount and protected.

We will address first the interaction of an FCC do-not-call registry with state do-not-call laws, and then comment on other issues relating to a national registry.

B. INTERPLAY WITH STATE DO-NOT-CALL LISTS

The foremost concerns of the Attorneys General are to preserve the right of the states to enforce their own laws and to work cooperatively with federal authorities in protecting consumers. To accomplish these ends, we explain why the Commission should not purport to preempt state laws and further explain how the states, the FCC, and the FTC can work together to protect consumers. We believe confusion will be minimized if the Commission expressly declares that it is not purporting to preempt state laws. For purposes of this Section II.B., we assume that the Commission will establish a do-not-call list and that it will work cooperatively with the FTC in that process. The thoughts behind these assumptions are discussed in subsequent sections.

1. State Do-Not-Call Laws Cannot and Should Not Be Preempted

Of paramount importance to the Attorneys General is that the existing, or future, state do-not-call lists not be preempted or purportedly preempted. The Commission has sought comment on this issue (NPRM ¶¶48, 62-63, 66). Application of traditional preemption analysis should counsel the Commission to make an affirmative, non-preemption statement within any do-not-call rule it adopts.[9]

[9] The Commission has not previously made an affirmative statement on this point regarding telemarketing. The Commission noted in the NPRM that a non-binding, staff-level letter opined that there was a preemptive effect of portions of the Communications Act, of which the TCPA is a part (NPRM, note 220). But FCC staff has also opined that the Communications Act did not preempt state actions against slamming. *See* Letter from Lawrence E. Strickling, FCC, to David J. Gilles, Assistant Attorney General, State of Wisconsin, dated August, 12, 1998, 13 FCC Rcd 15344, 1998 FCC LEXIS 4184.

Congressional intent is the cornerstone of a preemption analysis.[10] Ordinarily, only where Congress has expressed its intent to preempt state law is preemption found. "In the absence of express preemptive language, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation. Preemption of a whole field also will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[11] Furthermore, before preemption will be found in an area of traditional state powers, there must be "an unambiguous congressional mandate to that effect."[12] As the Supreme Court has noted, when Congress legislates "in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[13]

Consumer protection is clearly an area within the states' traditional police powers. The states have a long history of regulating against unfair business practices and protecting residents' rights.[14] Likewise, the distinct "right to be left alone" is a right that states have a strong, indeed compelling, interest in protecting.[15] In the context of do-not-call laws, the state laws are similar to laws against trespass or conversion (using another's property -- the telephone -- without permission). Criminal laws, such as trespass and conversion, as well as laws protecting the health and safety of a state's residents, are primarily and historically within the purview of the states.[16] Thus, in order to conclude that an FCC do-not-call rule would preempt state do-not-call laws, there must be an express, unambiguous and clear statement to that effect in the statute empowering the Commission to enact a do-not-call rule.

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[10] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

[11] *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985)(citations omitted).

[12] *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963).

[13] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(citation omitted).

[14] *Cedar Rapids Cellular Telephone v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002). *See also*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("[T]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons", *quoting Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 445 (1963)(Brennan, J. concurring)(joining in the Court's decision upholding the application of state law to an advertisement used across state lines, noting that consumer protection legislation "embodies a traditional state interest of the sort which our decisions have consistently respected").

[15] *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

[16] *See*, *United States v. Delpit,* 94 F.3d 1134, 1149 (8th Cir. 1996) ("States possess primary authority for defining and enforcing the criminal law") *quoting Engle v. Issac*, 456 U.S. 107, 128 (1982)).

No clear and unambiguous statement to that effect exists. The TCPA provides that:

> (1) State law not preempted. Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits –
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> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.
>
> (2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.[17]

Clearly, there is no explicit expression of preemption on the face of the TCPA. In addressing the issue of state law preemption, Congress merely notes that the TCPA does not preempt state laws that impose more restrictive *intrastate* requirements.[18] Further, Congress articulated that, except with respect to technical and procedural standards,[19] the TCPA would not preempt state law.[20] Congress wrote nothing about the TCPA affirmatively preempting any state law. As the Eighth Circuit Court of Appeals correctly noted, "[i]f Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision."[21] Indeed, under the Supreme Court precedent cited above, Congress not only could, but was required to make clear an intent to preempt in order for preemption to be effectuated. In other words, in the absence of an intent to preclude any state enforcement (absent here), Congress's silence in this regard is not only conspicuous, it is dispositive.

With respect to the establishment of a national database, Congress made no mention of preempting states from enforcing their own laws. In fact, the only limitation Congress enacted is

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[17] 47 U.S.C. § 227(e)(1) and (2).

[18] 47 U.S.C. § 227 (e)(1).

[19] 47 U.S.C. § 227(d).

[20] 47 U.S.C. § 227(e)(1).

[21] *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547 (8th Cir. 1995).

that a State could not require the use of a database that does not include the portion of the national database relative to that State, thereby expressly acknowledging state enforcement of state laws.[22] Again, had Congress intended the TCPA to have a preemptive effect it could have and was required to articulate that desire in this same provision.

[22] 47 U.S.C. § 227(e)(2).

Congress's choice of language is very telling and provides evidence of Congress's lack of intent to preempt state law, either explicitly, implicitly, or through occupation of the field. Congress wrote that a state may not, "in *its* regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State."[23] This language is telling for several reasons. First, implicit in this language is that states would, in fact, have their own telephone solicitation regulations. Second, the only limitation Congress places is that the states' databases must include those numbers from any federal database relative to that state.[24] And there is no reference anywhere in the statute to limiting a state's enforcement powers.

Moreover, the TCPA specifically states that any FCC national do-not-call database "*shall* be designed to enable States to use the [Commission's database] . . . *for purposes of administering* or *enforcing State law.*"[25] That directive would have made no sense if Congress intended to give a national do-not-call registry preemptive effect.[26] Congress did not express an intention to preempt states on telephone solicitations, nor did Congress intend to occupy the field.

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[23] 47 U.S.C. § 227(e)(2) (emphasis added).

[24] This limitation is consistent with the position the states advocate here: that registrations with the FCC can be transferred to the states, so that the states would, in effect, be using the national registry.

[25] 47 U.S.C. § 227(c)(3)(J) (emphasis added).

[26] *Bailey v. City of Lawrence*, 972 F.2d 1447, 1452 (7th Cir. 1992) ("Courts are bound to construe a statute to avoid absurd results and favor public convenience"); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 819 (D.C. Cir. 1998) (Courts "should refrain from interpreting a statutory provision in a way that creates surplusage").

The Eighth Circuit Court of Appeals, therefore, correctly held that the TCPA does not preempt state law. In *Van Bergen v. Minnesota*, that court examined whether the TCPA preempted a state law regulating automatic dialing-announcing devices (ADAD's). It held that it did not, writing "that the TCPA does not expressly preempt state law, nor is it implied in the TCPA that Congress intended to preempt state law . . . ."[27] The Eighth Circuit recognized that the TCPA expressly stated there was no preemption as to intrastate calls, but held that statement did not imply that everything else was preempted.[28] This conclusion is consistent with the reasoning set forth above. And, as noted in *Van Bergen*, the Congressional findings provide further support for the notion that the TCPA was intended to supplement, rather than "supplant," state law.[29] The better reading is that the federal law was enacted to supplement state and federal laws, to broaden the impact and coverage of enforcement actions, to facilitate national results and changes in business practices affecting consumers, and to stop nefarious efforts by fraudulent operators to seek refuge in far away states.[30]

The Commission has specifically inquired about the authority of a state to regulate telemarketing calls originating in another state (NPRM ¶63). As a threshold matter, states can enforce their consumer protection statutes against out-of-state actors pursuant to their respective "long-arm" statutes.[31] So long as the traditional due process analysis is satisfied, states are permitted to reach out-of-state violators.[32]

States similarly have enforced their own do-not-call database laws against telemarketers across the country, irrespective of whether the call was "intrastate" or "interstate" in nature.

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[27] 59 F.3d 1541, 1548 (8th Cir. 1995).

[28] *Id*.

[29] *Id.* at 1547.

[30] For example, Congress recognized that "[t]he most common mode of telemarketing fraud is the fly-by-night, boiler room, anonymous operator, whose contact with the consumer is limited to the telephone, and whose mobility and anonymity permit the consumer no recourse if the goods are deficient or undelivered. These types of operations make enforcement and prosecution against fraudulent telemarketers difficult, particularly for State law enforcement officials." Statement of Senator Bryan, 139 Cong. Rec. S. 8375-76 (June 30, 1993)(remarks made in reference to proposed Telemarketing and Consumer Fraud and Abuse Prevention Act).

[31] *State ex rel. Nixon v. Beer Nuts, Ltd.,* 29 S.W.3d 828, 833-36 (Mo. App. 2000); *State ex rel. Miller v. Internal Energy Management Corp.* 324 N.W.2d 707, 710 (Iowa 1982); *State by Lefkowitz v. Colorado State Christian College of the Church of the Inner Power, Inc.*, 346 N.Y.S.2d 482, 486 (N.Y. Spec. Term 1973); *Com. by Packel v. Tolleson*, 321 A.2d 664, 694 (Pa. Cmwlth. 1974), *aff'd*, 340 A.2d 428 (Pa. 1975); *Steed Realty v. Oveisi,* 823 S.W.2d 195, 198 (Tenn. App. 1991) (seller of out-of-state real property who advertised and closed his real estate deals in Tennessee, was subject to suit under Tennessee's consumer protection statute); *State v. Reader's Digest Ass'n, Inc.*, 501 P.2d 290, 302-03 (Wash. 1972).

[32] *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Telemarketers know this, which is why hundreds of firms have purchased existing state do-not-call lists and removed these consumers' telephone numbers from their own solicitation lists.[33] Since the enactment of state do-not-call database systems, many states have taken legal action against telemarketers who violate their laws by calling into their states.[34] No such action has been defeated by the argument that a state cannot protect its residents from receiving solicitations they have stated they do not want.

While the intent of Congress and the states' historical role in combating fraud is indisputable, there are additional practical considerations that bear mention. Since nearly half of the states already have responded to consumer demand for the means to stop unwanted telemarketing calls, the Commission should also consider the possible impact its actions might have on existing and developing state database systems:

- More than seven million consumers *already* have enrolled in states' existing do-not-call database systems, and millions more will likely do so over the next year as do-not-call systems go into effect in California and other states that have recently passed implementing legislation. By the time this Commission would implement its registry, widespread reliance on the state systems will be firmly in place. If the Commission's registry purports to usurp the states' authority, or simply confuses the matter, state education efforts to encourage registration could be jeopardized and considerable confusion would result at both state and national levels regarding the status of a consumer's enrollment in a state's system as well as any benefit to be gained by registering with the Commission's registry.

[33] For example, 494 out-of-state telemarketers have subscribed to the Arkansas do-not-call list, 527 to the Colorado list, 554 to the Indiana list, 344 have subscribed to the Missouri list, 392 to the Oregon list, and 320 to the Texas list.

[34] Nationwide, more than 300 enforcement actions have been taken against telemarketers, with nearly half of this number involving telemarketing companies calling from across state lines. The State of New York, for example, announced settlements with 13 companies engaged in telemarketing on March 8, 2002, including settlements with Qwest Telecommunications, a telecommunications company, and Discover Financial Services (Discover Card).

- Hundreds of thousands of consumers already have paid modest administration fees for enrollment in their own states' do-not-call systems and will continue to do so.[35] Any reduction in the protection afforded by the states' laws by virtue of a preemptive effect (or a claimed preemptive effect) would negatively affect those consumers and risk a breach of the public trust, and, possibly, a request for refunds of those enrollment fees.

The creation of a central registry compatible with existing state systems and adaptable for future state systems, so as *ultimately* to offer consumers an expedient way to stop all unwanted telemarketing calls is, and has always been, a concept supported by the Attorneys General. Additionally, ensuring that any system would be easily accessible by the states for enforcement purposes would be highly desirable.

2. Cooperation with States and Exchange of Information

The Commission seeks comment on several issues related to the interplay with state do-not-call lists (NPRM ¶¶60-66), including the effectiveness of state do-not-call laws, whether a national list would correct "shortcomings" of state laws (NPRM ¶60), or whether the proliferation of state do-not-call lists makes a national registry unnecessary (NPRM ¶66).

[35] While many state databases are free, several charge a small fee to defray the cost of their systems, such as a $10.00 initial enrollment and a $5.00 renewal fee. Oregon charges an initial registration fee of $6.50 and an annual renewal fee of $3.00, and Texas charges $2.25 to register.

As noted above, the effectiveness of do-not-call laws is demonstrated by public demand for the laws as well as the number of persons who enroll. The increase in the number of these laws does not obviate the need for a federal do-not-call list. In fact, a federal registry could complement state do-not-call laws. Not all states have do-not-call laws, and the ones that do primarily protect only the residents of that state. Even though the states have the power to prosecute persons placing calls from outside the state (see Section II.B.1, above), such prosecutions can be difficult as a practical matter. Some state legislatures have chosen not to exercise their full authority over some entities operating from outside the state.[36] Another advantage of a national registry is that it may make it possible for telemarketers to obtain do-not-call lists for several states or the United States from one source, if states are able under FCC regulations and state law to share data. Thus, a national registry is not made unnecessary by state do-not-call laws. Rather, a national registry would provide another vital option for consumers that could complement state laws, particularly when there is cooperation in sharing of information among state and federal regulators.

That leads to the question of how an FCC do-not-call registry would operate with state registries (NPRM ¶62-66). We envision administration and enforcement in a way that recognizes state sovereignty while government officials work together to protect the public. There is nothing novel or peculiar about state and federal agencies having their own laws forbidding the same conduct. Nor is there anything unusual about state and federal agencies working cooperatively in enforcement of these laws for the common good. We see these principles at work in enforcement of drug laws and other criminal laws, as well as in enforcement of federal and state civil rights laws. The states often work cooperatively with the Federal Trade Commission in enforcement of consumer protection laws. The cooperation can come in the form of joint prosecutions or a division of labor agreed upon by the regulators.[37] These same principles can easily be applied to do-not-call laws as well.

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[36] Among those states that exempt some entities over which a federal agency has regulatory authority are Missouri (Mo. Rev. Stat. § 407.1095(d)) and Vermont (9 Vt. Stat. Ann. § 2464a(a)(5)).

[37] For instance, the states frequently work in tandem with the Federal Trade Commission and its staff in enforcement "sweeps" in which numerous lawsuits are filed nationwide to enforce the various state and federal laws. A law enforcement sweep dealing with cold-call telemarketing called "Ditch the Pitch" was coordinated by FTC staff and participated in by a number of states in October 2001. In other areas, a division of labor was an effective tool. For instance, the states undertook several national investigations and extensive litigation efforts resulting in significant industry changes in the sweepstakes industry, while the FTC made significant headway in the area of Internet scams.

The public can best be served by a system in which there is sharing of information among federal and state regulators in both creation of the registry and enforcement. The interests of the public in enforcement will be best advanced if the state regulators retain the authority to make prosecutorial decisions on state laws and, where authorized, federal law.

In analyzing the most efficient arrangement, it is important that the creation and administration of a national database be viewed separately from enforcement of the laws. We assume and recommend that if the FCC and the FTC decide that there should be a national database, they will work cooperatively to establish a single database. For purposes of the creation of the database, it will not matter whether there are some differences between what telemarketers are barred from doing under the FCC and FTC laws and regulations because that is an issue for enforcement. The public should be able to contact either federal agency to enroll on the do-not-call list and receive the protection of both agencies' laws. (See also Section II.C., below, on FCC-FTC interplay).

The states can work within this cooperative arrangement between the FCC and FTC. The FCC and FTC should agree, by regulation, to share enrollment information with states that have do-not-call laws permitting a state to provide do-not-call protection to persons who enroll with the FTC or FCC. Some states have such authority already and are even required to import such data from the FCC, because their do-not-call laws were created in contemplation of the Commission one day amending the TCPA Order to adopt a centralized do-not-call registry.[38] If the FCC and FTC issued rules in which they agreed to share enrollment information with states, undoubtedly more states would adopt laws or rules to allow them to accept do-not-call enrollments from the FCC or FTC.

Conversely, the FCC and FTC should agree to accept enrollments from state do-not-call databases into their national database and transfer data from state lists into the federal list. At least one state (Kentucky) already authorizes the sharing of its database information with the FTC or FCC,[39] and if these data-transfers were authorized by federal law in a cooperative, non-preemptive system of enforcement, presumably more states would enact statutes or regulations allowing their subscriber data to be shared with those federal agencies.

For such a cooperative system to work most efficiently, the Commission's registry should be compatible with the states' do-not-call lists and allow for the transfer of information between state systems and the Commission's registry. Few would dispute the desirability of a seamless technology that would facilitate the sharing of information from a centralized registry with any

[38] Statutes and rules allowing or requiring importation of federal data include: California (Business and Professions Code) § 17595; Colo. Rev. Stat. § 6-1-905(3)(c); Ga. Code § 46-5-27(d)(4); 11 Ind. Admin. Code § 2-7-1; Ky. Rev. Stat. § 367.46994(1)(b); Mass. Ann. Laws ch. 159C, § 7; Minn Stat. § 325E.312.3; Mo. Rev. Stat. § 407.1101.3; and Tenn. Code Ann. § 65-4-405(c).

[39] Ky. Rev. Stat. § 367.46994(1)(b).

state's registry so that consumers might avoid needing to register separately with the state. We invite the Commission to work closely with our offices and the Federal Trade Commission in this endeavor. The Federal Trade Commission has already issued a request for proposals for its database that includes a requirement that a database system integrate state do-not-call data into the national database on a one-time basis. The FTC also asked for a proposal on an optional service to allow the FTC database to accept state data on a regular basis.[40]

To create the most effective system of enforcement, complaint information should be shared between the FCC and FTC and also with state do-not-call agencies. Sharing is accomplished most efficiently if the Attorneys General are able to access the national database directly, and search for particular offenders or complaints from within their respective states. Consumers who feel that they have been called by a telemarketer in violation of do-not-call laws should be able to contact either the FCC, the FTC, or their state agencies with a complaint without having to try to determine which agency or agencies have jurisdiction over the perpetrator. The agency receiving the complaint should make that determination, or refer the complaint to an agency that arguably has jurisdiction over the entity against whom the complaint is lodged. If the agency receiving a referral is one of two or more agencies with potential enforcement authority, the receiving agency should advise any other agency with potential enforcement authority whether the receiving agency will investigate and/or take enforcement action if an enforcement decision has been made. The agency obtaining the referral could then make a judgment as to whether it can and should take action based on the complaint. In situations in which a state do-not-call agency accessed the national database and found complaints on which the agency felt enforcement was appropriate, the agency could proceed without a direct "referral."

[40] *Performance Work Statement for a National Do-Not-Call Registry*, Sections C-5.1.1 and C-5.1.2, issued August, 2002, by the Federal Trade Commission. The FTC request also refers to possibly integrating data from the marketing associations. At least one state -- Vermont -- contracts with the Direct Marketing Association as the vendor for maintaining its do-not-call list.

For example, a consumer on a do-not-call list may receive a call from a common carrier under FCC jurisdiction. The consumer could contact the FCC. The state do-not-call agency could access the national database and assess the complaint or numbers or types of complaints in the state, or the FCC would notify the consumer's state do-not-call agency and advise the state agency if the FCC planned to take action. Based on the information the state agency obtained, it would then decide to: (1) take no action, (2) proceed under the TCPA in federal court, (3) proceed under the state's do-not-call law in state court, assuming the call violates a state law, or (4) sue under the TCPA in federal court and include a count for violation of state law, invoking the federal court's supplemental jurisdiction.[41] The FCC would provide the state with the necessary database information to allow the state to bring its federal or state suit. Conversely, if a state agency receives a complaint, the state agency could contact the FCC and/or FTC if either of those agencies had potential enforcement authority, and would also advise the federal agency of its intended enforcement action. As in other areas of law enforcement, the law enforcement agencies may defer to one another so that only one agency is prosecuting a perpetrator, but they retain the right to have separate sovereigns bring separate actions. And in some circumstances, particularly with flagrant or repeat offenders, prosecution by multiple agencies will be appropriate.

Moreover, in some cases sharing of information will be important in identifying do-not-call law violators. Consumers often will lack information to completely identify the telemarketer behind the call about which the complaint is made. The FCC and FTC should establish a database or databases that allow violation reports to capture the date and time of the call and every bit of information a consumer may have received that could help identify the caller. Some states already obtain such information. Maintaining a record of the identities of telemarketers who have access to the database and their various affiliate names and calling locations may help in this violation-tracking process. When one agency identifies a "doing-business-as" name or an alias for a telemarketer, it should be able to share that information with other agencies to facilitate identification of the caller. Again, some states may need to adopt laws or regulations to facilitate this sharing, but those actions are more likely to be forthcoming if the FCC and FTC, by rule, indicate that they will be sharing information with state do-not-call agencies. In all cases it is important to be able to identify when a particular consumer's registration in a database became effective for purposes of confirming a violation has occurred.

[41] 28 U.S.C. § 1367.

Finally, the Commission inquires whether its "slamming" regulations provide a good model for FCC-state relationships (NPRM ¶62). Under that arrangement, states could enforce the federal anti-slamming law if they chose to "opt-in" to the federal requirements.[42] That arrangement does not apply to the do-not-call laws. The anti-slamming law did not have an express provision for state enforcement. The FCC anti-slamming regulations provided a framework for state enforcement of those laws. But the statute that restricts telemarketer activities and authorizes the creation of a do-not-call registry explicitly authorizes state attorneys general to bring actions for violations of the statute.[43] Therefore, no special opt-in arrangement is necessary or helpful.

C. INTERPLAY WITH THE FTC

The Commission seeks comment on the interplay with the FTC's proposed do-not-call list (NPRM ¶49), and also seeks comment on several areas related to the FTC's do-not-call proposal, including potential inconsistencies in the types of businesses covered by FCC and FTC regulations (NPRM ¶¶55-59). The Commission also seeks comment on the twelve statutory criteria it must consider in establishing a national do-not-registry (NPRM ¶53, *citing* 47 U.S.C. § 227(c)(3)).

In the preceding section we described a cooperative arrangement involving the FTC and the states. The Commission specifically raises the question of whether there would be inconsistencies between FCC and FTC regulations regarding, for instance, for-profit companies soliciting on behalf of not-for-profit entities (NPRM ¶56). Even assuming that the FCC and FTC take different views on this issue, those differences are not "inconsistencies" presenting an impediment to administration of a national do-not-call database.

Differences in the relevant laws or regulations on the scope of prohibited activity relate to enforcement, not administration. For instance, a not-for-profit under FCC jurisdiction may be immune from FCC enforcement actions for unsolicited calls. But this difference in scope of coverage exists even with company-specific do-not-call lists. Under either system, the telemarketer is responsible for determining which laws are applicable to it and complying with those laws. This is the same responsibility any company has in areas of the law where there could be different standards established by the laws of different sovereigns, whether those laws relate to labor, tax, the environment, or telemarketing.

The Commission also seeks comment on consistency between the FCC and FTC on regulations regarding wireless telephone service, business subscribers, authorization for calls, record keeping requirements, and database privacy (NPRM ¶¶57-59). In substantive areas, we do

[42] 47 U.S.C. § 258; 47 C.F.R. § 64.1110.

[43] 47 U.S.C. § 227(f).

not support consistency merely for the sake of consistency. The FTC proposals should be viewed on their merits because, as noted above, differences are not necessarily inconsistencies.

The Commission inquires whether an FTC database will be consistent with the criteria required by Section 227(c)(3) of Title 47 of the United States Code (NPRM ¶49). It is difficult to comment on inconsistencies prior to the FTC issuing its rules. We note that some of the statutory criteria merely require specification of a means for the Commission to act, rather than specific action, making a true "inconsistency" impossible. The Commission can simply ensure that the necessary specifications or disclosures are made. Other criteria, especially those addressing dealings with common carriers, may not be covered by an FTC rule, also making a true "inconsistency" impossible.

We do note that one criterion is that the database "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law."[44] As noted above, we specifically advocate that the Commission, and the FTC, design a national database with that criterion in mind.

The Commission does refer to a potential true inconsistency: a charge for consumers being included on a national database (NPRM ¶57). If only one entity (the FCC or the FTC) offered do-not-call inclusion for free, then most consumers would call that agency. In order to have an equitable distribution of costs, both the FTC and the FCC should offer inclusion to the consumer at no cost. The costs of administration should be borne, to the extent possible, by the businesses benefitting from telemarketing, so user fees to obtain the lists should be designed to generate significant revenue toward the costs of administration of the registry, and general revenues or fines could supplement those fees if needed.

Currently more than half the existing state do-not-call database systems impose modest fees on prospective telemarketers for access to the do-not-call list, and several states require nominal fees from consumers to offset the cost of enrollment. While a number of states hosting do-not-call database systems have placed responsibility for maintaining those systems in other agencies, several of the Attorneys General do oversee their states' database systems.

[44] 47 U.S.C. § 227(c)(3)(J).

As an example, the State of Missouri received a legislative appropriation for the anticipated costs of establishing its do-not-call database. However, it has been able to recoup a portion of the ongoing maintenance costs by requiring a modest fee for copies of the quarterly do-not-call list it produces.[45] Telemarketers are required to pay $25.00 per quarter for each area code segment of the list.[46] During the first year of implementation, slightly more than $100,000 was collected from telemarketers seeking copies of the Missouri do-not-call list, while the ongoing maintenance cost is nearly $200,000 annually, not including personnel. The State of Missouri charges residents nothing to enroll, which may have contributed to the high enrollment rate.[47] Missouri's experience has been that modest fees charged for access to the do-not-call list can offset, but are not likely to fully cover, the ongoing costs of database systems.

The State of Oregon charges telemarketers an annual fee of $120.00 for database access.[48] In addition, consumers are required to pay a registration fee of $6.50 and an annual renewal fee of $3.00.[49] Oregon has retained a list administrator who is responsible for maintaining the Oregon do-

[45] Because all allocations must be made through the Missouri State Legislature there is not, strictly speaking, a direct "set-off" from recovered fees. Recovered fees are deposited into a separate fund and are available for future appropriations.

[46] Missouri Code of State Regulations, 15 C.S.R. § 60-13.060(1)(B). This enables smaller, local telemarketing operations to acquire the list for less than a state-wide (or interstate) telemarketer.

[47] As of late October 2002, 1,082,131 residential telephone numbers were included in the Missouri do-not-call database. Missouri's population is approximately 5.5 million.

[48] Currently more than 850 telemarketers subscribe to the Oregon do-not-call list.

[49] As of October 2002, there were more than 85,000 residential telephone numbers included in the Oregon do-not-call database.

not-call list. Oregon's experience is that the combined subscription and registration fees cover the cost of third-party maintenance of its database. In both Missouri and Oregon, the costs of enforcement have largely been recouped as both are able to receive awards for their investigative and litigation costs.[50] None of the states has reported industry members being unable to pay the modest list access fees imposed.

The states realize that a no-charge federal registry would presumably reduce revenues generated from fees charged to consumers to enroll in states where there is such a charge. But the costs of administration for those agencies would be reduced as well. Indeed, some states might choose to rely entirely on federal registration**.**

[50] Oregon and Missouri, combined, have initiated more than 200 enforcement actions for violations of their do-not-call lists.

The Missouri and Oregon experiences also suggest that greater consumer participation may be achieved if there is no fee charged to consumers for enrollment. Several of the recent state database systems implemented have abandoned the imposition of consumer registration fees, and have experienced widespread growth as consumers have eagerly registered.[51] To the extent that a state may currently require a small registration fee, we are concerned that any additional fee will serve only to dissuade registration in the Commission's registry. The Attorneys General recommended to the FTC that it not charge consumers for the privacy protection it seeks to ensure through the creation of its registry, and we make the same recommendation to the Federal Communications Commission.

This is not to minimize the fact that the costs of maintaining a do-not-call database are significant. When the FCC considered implementing a national do-not-call list in 1992, it was presented with estimates by industry ranging from $20 million to $80 million for implementation, in addition to an annual operational cost of around $20 million.[52] While technological improvements may have reduced these costs, they would still be significant. States implementing do-not-call database systems have incurred significant expenditures in establishing computerized databases, the corresponding personnel and other equipment and location expenses, and in consumer education efforts. Missouri's database system, for example, cost in excess of $580,000 for implementation and the first year's operations, including additional staffing for its do-not-call hotline. Tennessee had similar experiences, incurring approximately $600,000 in implementation and maintenance costs over a two-year period. Additionally, Indiana's do-not-call database, which went into effect this year, has cost slightly more than $500,000. None of these estimates of implementation and maintenance costs include actual enforcement costs. The Attorneys General, and other state agencies, have often dedicated additional personnel to the many enforcement actions undertaken across the country.

D. AGGRESSIVE ENFORCEMENT OF DO-NOT-CALL LAWS IS IMPORTANT

It has been the experience of the Attorneys General that the number of reported violations of a state's do-not-call database law often represents only the *tip* of the proverbial iceberg. Many consumers do not file violation reports when they have been called, despite being on a do-not-call list. Some of them do not report a violation because they were unable to obtain sufficient

[51] See note 5, above (regarding number of registrants in states with do-not-call lists).

[52] Report and Order, 7 FCC Rcd 8752, 8758 (1992).

identifying information from the telemarketer.[53] Consequently, the number of reported violations is likely to significantly underrepresent the number of actual violations that have occurred.

[53] In some cases a telemarketer has been identifiable only by a return telephone number provided to the consumer because the name used by the telemarketer -- or which the consumer remembered -- was not sufficiently specific. It is important to encourage all violations to be reported, even where a report can be only partially complete.

The states' aggressive approach of contacting the reported violators and either suing or requiring swift and public settlements has helped educate both the more recalcitrant end of the industry as well as consumers, thus enhancing the effectiveness of the system. Our experience has been that the number of telemarketers making arrangements to obtain copies of the do-not-call lists increases significantly after such public actions, strongly suggesting greater awareness of enforcement actions prompts greater compliance.[54] Several states have recouped their enforcement costs through settlements and awards of attorneys fees in their enforcement actions.[55]

Accordingly, the Attorneys General recommend that the Commission contemplate a highly aggressive initial enforcement effort to reinforce its education efforts among both consumers and within the industry. This could require extra staffing or a temporary shifting of resources within the Commission, just as it has in the states. The ultimate effectiveness of its registry may largely be determined by the enforcement resources committed to it.

E. COMPANY-SPECIFIC DO-NOT-CALL LISTS ARE INADEQUATE AND A NATIONAL DO-NOT-CALL REGISTRY IS NEEDED

The Commission poses a number of interrelated questions in its NPRM on the establishment of a do-not-call registry (NPRM ¶¶14,15,16, 52). The Commission seeks comment on the overall effectiveness of company-specific do-not-call lists, how well the company-specific approach balances the interests of consumers who want to receive telemarketing calls (and telemarketers who wish to make them) against the interests of consumers who do not want to receive such calls, and the continued validity of justifications for rejecting a national do-not-call list taking into account a potential FTC do-not-call registry or other changed circumstances (NPRM ¶¶14,15,16). The Commission also seeks comment on a number of features of a national do-not-call registry. We agree with the Commission that it should revisit the issue of establishing a national registry in light of consumer complaints (NPRM ¶49), particularly when designed to work in conjunction with state do-not-call databases. We do not seek the abolition of company-specific lists, however. Even when a national do-not-call registry is established, consumers should still be able to choose to exclude future calls only from specific companies, or obtain the benefit of company-specific no-call lists from companies that are exempt from the provisions of do-not-call laws.

1. General Considerations

[54] In Kentucky, the rate of complaints of violations of the state's do-not-call law dropped 78% after the filing of six lawsuits and 35 Assurances of Voluntary Compliance in the first 90 days the law was in effect.

[55] Missouri had collected $645,000 from telemarketers as of late October 2002. Kentucky had recouped $300,000 as of early November 2002.

The benefits of prohibiting unsolicited telemarketing calls for those consumers who do not want to be bothered in their homes is obvious. But there are benefits to telemarketers too. Members of the industry have suggested that removing names from their call lists "up front" can result in greater efficiencies as calls to presumptively non-interested consumers could be avoided altogether.[56] In evaluating the cost to industry we recommend that any savings realized due to greater efficiencies by avoiding calling such consumers be considered by the Commission.

Additionally, in assessing the benefits to consumers, the benefit of not being interrupted by unwanted telephone calls merits discussion. If consumers *know* they should not be receiving telemarketing calls, they will be more apt to hang up on potentially fraudulent calls.[57] While

[56] The Direct Marketing Association has indicated support for the use of do-not-call lists noting that efficiencies in telemarketing operations may be realized by avoiding consumers who have already indicated no interest in receiving offers. Paul Choiniere, *New Law Gives Connecticut Residents Chance to Curb Calls from Telemarketers,* THE DAY, January 1, 2001. Avoiding unproductive calls can be efficient for the industry. One commentator observed that value of one hour of time (at a minimum wage level) for each of the nation's 3.5 million telemarketing employees totals more than $18 million. Michael E. Shannon, *Note, Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 405, n. 203 (2001) (citing, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8785-89 (1992)).

[57] Experts working with older telemarketing fraud victims point to those victims' unease with hanging up the telephone on any callers. However, knowing from the outset that the call has been placed in violation of the law,

difficult to quantify, the benefit to consumers of not being interrupted by unwanted telemarketing solicitors -- stopping conversations with family members, putting on hold another telephone call, disconnecting a dial-up Internet connection, getting up from the family dining table -- is more than just the avoidance of "annoyances."[58] There is a *tangible* cost to be considered when a *single* telemarketer may interrupt the privacy of more than 75 households each night.[59] In view of the high enrollment in several recent state do-not-call database systems,[60] it is reasonable to suggest that nearly half the residents of this country may wish to be spared the interruptions caused by uninvited telemarketers in their home. The benefits to be realized by consumers stem from their having control over their home and their own privacy -- the importance of consumer sovereignty should tip the scales decisively in favor of consumers.

2. There Are No Practical Impediments to the Establishment of a National Do-Not-Call Registry

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by virtue of the consumer's enrollment in a do-not-call system, will help prospective victims terminate fraudulent solicitations.

[58] For some consumers the benefit is even more significant because their cost can be considerable, such as in the case of the telemarketing fraud victim, or consumers who suffer fear or anxiety when an unknown caller calls or disabled consumers who suffer physical discomfort simply in answering the telephone. Avoiding the effort and possible difficulty of obtaining a refund or canceling a transaction later should not be ignored.

[59] If a single telemarketer calls from 6:00 pm Eastern Time through 8:00 pm Pacific Time, for a total of five hours covering the four time zones, using a predictive dialer which requires a consumer to answer before the telemarketer's own line is open, with an average call length of four minutes, 75 households may be interrupted.

[60] *See* note 5, above (documenting popularity of state do-not-call registries).

The Commission seeks comments on several issues regarding the feasibility of a national registry (NPRM ¶¶51,52). The FTC's proposed do-not-call rule and the experience of at least 19 states show that a national do-not-call registry is feasible. Telemarketers could obtain and be charged for only portions of the database, such as selected areas codes, to reduce costs for small businesses and regional telemarketers. Several states already use such a system, charging telemarketers for their lists on a regional or area-code basis.[61] Modern software makes frequent updates technologically feasible. Privacy is maintained because telemarketers typically receive only the list of phone numbers they are prohibited from calling, and no other identifying information, or by requiring written confidentiality agreements.[62]

3. An FCC Do-Not-Call List is Constitutional

The Commission has raised questions regarding the constitutionality of a national do-not-call list (NPRM ¶¶12,50). No constitutional impediments exist to the Commission establishing a do-not-call registry. First, the Supreme Court has long upheld government measures that protect the privacy of homeowners by barring others from intruding into the home to express unwanted communications. Second, even were a do-not-call registry analyzed as a restriction on commercial speech, it would satisfy the test for such restrictions, set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

a. A do-not-call list is a valid protection of a consumer's privacy

[61] Mo. Code Regs. tit., 15, § 60-13.060(1)(B).

[62] Mo. Code Regs. tit., 15, § 60-13.060(1)(A).

The Supreme Court's opinion in *Rowan v. United States Post Office*, 397 U.S. 728 (1970), controls the question of whether a do-not-call registry offends the First Amendment. There, certain entities that did business by mail challenged a federal statute allowing householders to prevent mailings from reaching their homes.[63] Under the statute, any householder could "insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.'"[64] In order to obtain the benefit of the statute, the householder merely had to notify the Postmaster General that he had received material falling within the statute. The sender of the mail would then be required to "refrain from further mailings to the named addressee."[65] The sender was also required to "delete the name of the designated addressee from all mailing lists owned or controlled by the sender," and refrain from the "sale, rental, exchange or other transactions involving mailing lists bearing the name of the designated addressee."[66]

The *Rowan* plaintiffs sued, claiming the statute violated the First and Fourteenth Amendments and that it was unconstitutionally vague. In essence, they argued that their ability to communicate even with unwilling mail recipients could not be constrained by order of the government.[67] In response, the Supreme Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has the

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[63] *Id.* at 729-30.

[64] *Id.* at 730.

[65] *Ibid.*

[66] *Ibid.*

[67] *Id.* at 735.

right to press even 'good' ideas on an unwilling recipient."[68] Stated the Court: "Nothing in the Constitution compels us to listen to or to view an unwanted communication, whatever its merit . . . . The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another."[69]

[68] *Id.* at 738.

[69] *Id.* at 737.

The Court recognized that "we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail."[70] It was true that making "the householder the exclusive and final judge" of what mailings would reach the householder's residence would "undoubtedly" have the "effect of impeding the flow of ideas, information, and arguments that, ideally, he should consider."[71] However, the Court had previously recognized that the "freedom to distribute information to every citizen" is limited by "leaving 'with the homeowner himself' the power to decide 'whether distributors of literature may lawfully call at home.'"[72] Thus, when the "highly important right to communicate" was weighed against "the very basic right to be free from sights, sounds and tangible matter we do not want," the Court concluded that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."[73]

This reasoning extended the Court's traditional respect for "the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property" to the mails.[74] It ended the "mailer's right to communicate" upon an "affirmative act of the addressee" that notified the mailer "that he wishes no further mailings from that mailer."[75] Any other holding, according to the Court, would be "to license a form of trespass and would hardly make more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home."[76] This statute allowed "the citizen to erect a wall" impenetrable by any speaker without the householder's "acquiescence." *Id.* at 738. For these reasons, "[t]he asserted right of a mailer . . . stops at the outer boundary of every person's domain."[77]

A clear analytical framework emerges from *Rowan*. Consumers control absolutely the content of messages that may come into the home. Whenever a speaker, regardless of the mode of speaking, attempts to deliver a message inside the home, the consumer may either listen to or shut out that message in his sole discretion. If the speaker persists and attempts to communicate the message, the government may assist the consumer in protecting his right "to be let alone." Such

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[70] *Ibid.*

[71] *Ibid.*

[72] *Ibid.* (quoting *Martin v. Struthers*, 319 U.S. 141, 146, 148 (1943)).

[73] *Rowan*, 397 U.S. at 736-37.

[74] *Id.* at 737.

[75] *Ibid.*

[76] *Ibid.*

[77] *Ibid.*

assistance is a valid regulation designed to protect the right of every consumer to determine what messages will be allowed to penetrate the "outer boundary" of his particular "domain."

A do-not-call registry fits within this framework. The consumer who might receive a telemarketing call has the absolute right to determine whether the call will or will not be made. Once the consumer makes an affirmative decision to be included on the registry, telemarketers must refrain from calling that consumer's number and leave the consumer to the comfort of his home. If the telemarketer does not, the government has created the no-call registry and corresponding penalties as a method of assisting the consumer in protecting this right. Far from being an impermissible regulation of speech, the registry merely works to prevent "a form of trespass." This form of trespass is even more repugnant when the trespasser/telemarketer uses the consumer's own property -- the consumer's telephone -- for the telemarketer's sales effort. At least mass mailers use their own paper. To invalidate a do-not-call registry would be to hold that a consumer with a telephone "could not cut off an offensive or boring communication and thus bar its entering his home."

Indeed, a do-not-call registry is the embodiment of the counsel given by the Supreme Court. The Court has written that a statute that makes it an offense to "ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed," is acceptable.[78] Such a statute passes muster because it "leaves the decision" of whether a caller may disturb him "with the homeowner himself."[79] Moreover, "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus [the Court has] repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."[80] A do-not-call registry does just that.

b. A do-not-call list satisfies the test for a valid restriction on commercial speech

Even if a do-not-call registry is viewed as a restriction on speech, it is a restriction on commercial speech. The government is granted greater power to restrict commercial speech than other speech.[81] For over two decades, *Central Hudson Gas & Electric Corp. v. Public Service Commission* ("*Central Hudson*")[82] has served as the benchmark for determining whether a

[78] *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943).

[79] *Ibid.*

[80] *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

[81] Even if the proposed do-not-call registry were to apply to a broader spectrum of activity such as charitable solicitation, the *Rowan* analysis set forth above and traditional time, place, or manner analysis would clearly support such a regulation. See, *e.g.*, *National Federation of the Blind v. Pryor*, 258 F.3d 851 (8th Cir. 2001).

[82] 447 U.S. 557 (1980).

regulation of commercial speech is permissible under the Constitution.[83] In *Central Hudson*, while the Court recognized that commercial speech deserves less constitutional protection than other types of expression, it also held that "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech." The Court spelled out a four-part test to determine the constitutionality of restrictions. The first prong is whether the speech relates to lawful activity and is not misleading. If it does, the state must show that: (1) the governmental interest is substantial; (2) the restriction directly advances the government's asserted interest; and (3) the restriction is "not more extensive than [ ] necessary to serve that interest."[84]

The proposed national do-not-call registry easily satisfies the *Central Hudson* test, even if we assume (contrary to substantial evidence) that telemarketing calls are not misleading and relate only to lawful activity.

(1) The governmental interest is substantial

As detailed throughout these comments, the government has a palpable and substantial interest in protecting citizens' interest in the privacy of their homes. This interest has repeatedly been affirmed by the Supreme Court, which has stated:

[83] The Supreme Court recently affirmed the use of the *Central Hudson* analysis in *Thompson v. Western States Med. Center*, 122 S. Ct. 1497, 1504 (2002).

[84] 447 U.S. at 566.

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home. . . . The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.[85]

The Court's opinions in *Rowan* and in cases such as *Martin v. Struthers*, 319 U.S. 141 (1943) ("A city can punish those who call at a home in defiance of the previously expressed will of the occupant. . . ."), confirm the Court's longstanding recognition that the government has a powerful interest in reducing the unwanted delivery of speech into the privacy of the home.

[85] *Carey v. Brown*, 447 U.S 455, 471 (1980) *quoting Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring).

Many people view unsolicited telephone calls as an invasion of privacy.[86] In particular, the telephone is a medium unique in its ability to "bring those outside the home into the home for direct verbal interchange."[87] Once a person answers the phone, the invasion of privacy has occurred. Indeed, the invasion occurs once the phone rings. Many senior citizens, who are among the persons most targeted by telemarketers, have physical impairments that make merely getting to the phone a chore. As noted in Section III.C., below, the frequent "hang-ups" that occur when predictive dialers are used can intimidate citizens. In addition, as the court in *Minnesota v. Casino Marketing Group* observed, unlike media such as radio or television, which respond at the listener's direction, "the telephone summons the subscriber, depriving him or her of the ability to select the expression to which he or she will expose herself or himself."[88] The court in *Casino Marketing Group* accordingly found that a state statute restricting the use of automatic dialing announcing devices served "the state's substantial interest in privacy."[89]

(2) The restriction directly advances the government's interest

Do-not-call registries provide an efficient and effective means for those persons who want to protect the privacy of their homes from invasion by unwanted commercial telephone solicitations, and thereby advance the governmental interest in facilitating that protection of privacy.

Several courts that have addressed First Amendment challenges to a similar measure -- the TCPA's prohibition against unsolicited fax advertisements -- had little difficulty concluding that the ban advanced the state's interests. For example, in *Texas v. American Blast Fax, Inc.*,[90] the court first found that the government's interests in preventing people from having to bear the cost of unsolicited faxes and preventing fax machine interference were substantial. Turning to the second prong of *Central Hudson*, the court found, as a matter of course, that the ban on unsolicited fax advertising directly advanced the government's interest because it "necessarily follows that banning such advertising will directly advance [the government's] interests."[91] Similarly, in *Destination*

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[86] *See Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1107 (N.J. Super. Ct. Law Div. 1995) (citing reports from the Senate Committee on Commerce, Science and Transportation).

[87] *Minnesota v. Casino Mktg. Group*, 491 N.W.2d 882, 888 (Minn. 1992).

[88] *Id.; see also Nat'l Funeral Svcs. Inc. v. Rockefeller*, 870 F.2d 136, 144 (4th Cir. 1989) (observing that "[u]nlike direct mail solicitations that can be readily distinguished and easily discarded, a recipient of telephone solicitations must answer the phone to determine who is calling, and must risk an uncomfortable confrontation to rid himself of the solicitor.").

[89] 491 N.W.2d at 891-92; *see also Minnesota v. Sunbelt Comm.*, 2002 U.S. Dist. LEXIS 18990, at *15-16 (D. Minn. 2002) (recognizing the state's substantial interest in protecting its citizens' right to privacy in the face of unsolicited fax advertisements and granting the Plaintiff's motion for a preliminary injunction).

[90] 121 F. Supp. 2d 1085 (D. Tex. 2000).

[91] *Id.* at 1092.

Ventures, Ltd. v. FCC,[92] the Ninth Circuit found that the TCPA's restrictions on unsolicited commercial fax advertising were a "reasonable means to achieve Congress's goal of reducing cost shifting" since it was undisputed that this type of advertising was responsible for the bulk of the cost shifting that Congress sought to reduce.[93]

(3) The restriction is not more extensive than necessary to achieve that interest

[92] 46 F.3d 54, 56 (9th Cir. 1995).

[93] *See also Minnesota v. Sunbelt Comm.*, 2002 U.S. Dist. LEXIS 18990 (D. Minn. 2002); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997) (upholding TCPA's restrictions on unsolicited fax advertisements under the *Central Hudson* analysis).

The last prong of the *Central Hudson* analysis requires there to be a "reasonable fit between the means and ends of the regulatory scheme."[94] This fit "is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'"[95] Although the final prong of the *Central Hudson* analysis is not a "least restrictive means test,"[96] the Court has stated that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so."[97]

A national do-not-call registry meets this test because it is narrowly drawn to preserve the privacy rights of those citizens who put their names on the list and also allows telemarketers to continue to solicit all other citizens. It draws the most efficient distinction between citizens who want to receive commercial telephone solicitations and citizens who view telephone solicitation as an invasion of privacy. Indeed, the one court that has found the TCPA's total ban on unsolicited faxes to be unconstitutional did so precisely because it concluded that a do-not-fax database -- precisely analogous to the do-not-call registry -- would be a constitutional, less restrictive alternative.[98]

The FCC and other government agencies have considered other options for restricting unsolicited commercial telephone solicitations in the form of the TCPA Order,[99] but as these

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[94] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001).

[95] *Board of Trustees, State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (*quoting In re: R.M.J.*, 455 U.S. 191, 203 (1982).

[96] *See id.*

[97] *Thompson v. Western States Med. Center.*, 122 S. Ct. 1497, 1506 (2002).

[98] *State ex rel. Nixon v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920 (E.D. Mo. 2002), *appeal pending,* 8th Cir. ## 02-2705, 02-2707.

[99] *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992).

comments and the NPRM suggest, the alternatives are inadequate. In particular, the company-specific do-not-call lists are an inferior tool to protect the privacy of citizens' homes for the obvious reason that a citizen can get relief from unwanted invasions of privacy only by informing each and every telemarketing company of his or her desire to not receive telephone calls -- *after* each and every company has already invaded the person's privacy at least once.

In summary, a national do-not-call registry is a constitutional restriction on invasive unsolicited commercial telemarketing. It directly advances the government's substantial interest in preserving the privacy of the home, but it is narrowly tailored to directly achieve its goals with only minimal infringement on the commercial speech interests of legitimate telemarketers.

F. CONSUMER EDUCATION

The Commission seeks comment on a proposal to educate consumers regarding the Commission's do-not-call list (NPRM ¶54). We agree with the Commission's proposal to require common carriers to notify consumers of the do-not-call list as well as ongoing efforts by the Commission to publicize the do-not-call rules. In addition, the Attorneys General recommend that the Commission consider a comprehensive consumer education program that also provides very specific instruction to registrants as to how to report a violation. This is an area addressed in several states by mailing "enrollment confirmation" packets to consumers. For example, the Missouri Attorney General mails an informational packet to each Missourian enrolling in the Missouri do-not-call database which provides explanatory information as to the consumer's rights under Missouri's do-not-call law, instructions for how to report a violation, and a sample violation report form. Each of Missouri's more than one million residential subscribers has been sent this material. Oregon also offers comprehensive consumer education packets to consumers inquiring about its do-not-call database system. Both Missouri and Oregon also offer educational information, and the ability to enroll, on their websites.[100] The Attorneys General encourage the Commission to factor in the costs of similar education for consumers utilizing its registry.

III. OTHER ISSUES

The Commission seeks comments on several issues separate from a do-not-call list:

A. UNSOLICITED FAXES

The Commission seeks comment on whether the general rules regarding unsolicited facsimile advertisements need to be changed and specifically identifies three areas for consideration:

[100] The Commission's website currently provides information on unwanted telemarketing calls and refers consumers to their state's consumer protection office for more information. <http://www.fcc.gov/cgb/consumerfacts/tcpa.html>. The Federal Trade Commission's website provides consumers with hyperlinks to 15 state do-not-call database websites that offer Internet enrollment, <http://www.ftc.gov/bcp/conline/pubs/alerts/dncalrt.htm>.

(1) the "prior express invitation or permission" definition, (2) the established business relationship exemption, and (3) fax broadcasters (NPRM ¶¶37-40).

1. Prior Express Invitation or Permission

The Commission solicits comment on the need to clarify the definition of "prior express invitation or permission" as it relates to unsolicited faxes. As an initial matter, the states support the Commission's finding in its 1995 Reconsideration Order that publishing or releasing a facsimile number, such as in a directory, does not constitute express consent to receive a fax advertisement.[101] With respect to the particular issue of membership in a trade association, while such membership may be consent to receive information from the association, it is not express permission to receive unsolicited fax advertisements. If association members do wish to receive fax advertisements, perhaps the association can maintain a separate list of those fax numbers to provide to advertisers.

Approaching the "express consent" issue on a case-by-case basis can be costly and time-consuming, as consent is the main defense fax advertisers claim. An ambiguous concept of express invitation encourages fax advertisers to devise ways of circumventing the TCPA by deceptively obtaining what fax advertisers call "consent." For example, Fax.com, Inc. has sent recipients a fax headlined "Your Permission Please." The message then stated that Fax.com is "asking you to help by receiving fax alerts that are finding missing children nationwide" and to offset the cost of these alerts, Fax.com will also be faxing advertisements. The fax further stated that recipients will continue receiving faxes from Fax.com unless they opt-out. To reduce the necessity of relitigating this question in every case, a concrete definition of "express" from the Commission would be helpful. The definition should make it clear that "express" means definite, explicit, or direct, and not left to inference. The Commission should also reinforce that a negative option does not create express permission or invitation.

In a related matter, it should be the sender's responsibility to maintain evidence of consent by recipients. It has been the states' experience in litigating TCPA cases that large-scale fax advertisers will claim that some recipients consented to the faxes but they have no records to prove consent.

2. Established Business Relationship

[101] 1995 TCPA Reconsideration Order, 10 FCC Rcd 12391, ¶37 (1995).

The Commission seeks comment on whether an established business relationship establishes consent to receive fax advertisements and whether the Commission should expressly provide for such an exemption. The Attorneys General respectfully submit that creating an established business relationship exemption runs contrary to the clear wording of the statute. The TCPA defines "unsolicited advertisement" as an advertisement sent to a person "without that person's prior express invitation or permission."[102] A business relationship exemption would rely on *implied* invitation or permission, which is contrary to the clear wording of the statute. That an existing business relationship is distinct from "express invitation or permission" is demonstrated by the subsection of the TCPA immediately preceding the "unsolicited advertisement" subsection. In defining a "telephone solicitation," the TCPA establishes distinct exemptions for calls with "express invitation or permission" and calls from a person "with whom the caller has an established business relationship."[103] One should assume in construing a statute that words are not superfluous.[104] Therefore, "express invitation or permission" must have a meaning beyond that found in "established business relationship." Moreover, consecutive subsections of a statute simultaneously enacted should be read consistently.[105] Therefore, the fact that an "established business relationship" exemption is found in the "telephone solicitation" definition but *not* in the "unsolicited advertisement" definition means that missing exemption for an established business relationship should not be added by courts or the Commission to the "unsolicited advertisement" definition. For the reason that an "established business relationship" exemption for unsolicited faxes is contrary to Congress' intent, the states are opposed to the Commission providing such an exemption.

3. Fax Broadcasters

The Commission seeks comment on whether it should specifically address the activities of "fax broadcasters." Fax broadcasters that maintain their own databases of fax numbers are the subjects of the vast majority of consumer complaints and state enforcement actions. The states support the Commission's finding that fax broadcasters who determine content of the advertisement or its destination are considered senders within the meaning of Section 227(b)(1)(C), rather than merely being disinterested fax broadcasters, and therefore the fax broadcasters can be held liable.[106] The rules should be amended to explicitly note this distinction. Furthermore, a definition of "common carrier" added to the rules would also help alleviate confusion about the status of entities transmitting faxes.

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[102] 47 U.S.C. § 227(a)(4).

[103] 47 U.S.C. § 227(a)(3)(A) and (B).

[104] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

[105] *Erlenbaugh v. United States*, 409 U.S. 239, 243-45 (1972); *U.S. West Communications v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000)(observing that when statutes are "enacted at the same time and form part of the same Act, the duty to harmonize them is particularly acute").

[106] *Fax.com,* FCC02–226, Notice of Apparent Liability for Forfeiture, ¶¶13-14 (August 7, 2002).

The rules should also specify particular activities that would expose a fax broadcaster to liability. The list should include sending unsolicited commercial faxes to a fax broadcaster's own database of fax numbers. Moreover, a fax broadcaster that sends to a database provided by someone else should seek documented reasonable assurances from that provider that the recipients have consented to receiving the faxes, or the broadcaster is also liable.

The Commission seeks additional comment on whether its rules requiring fax advertisements to identify the entity on whose behalf the message is sent have been effective in protecting consumers' rights to enforce the TCPA. Although requiring the *advertiser's* identity is helpful, not requiring identity information for the *sender* has been a hindrance. It has been the states' experience that fax broadcasters, who maintain their own databases and send others' advertisements to these fax numbers, frequently omit their identifying information as the sender in order to avoid detection and enforcement action. The states request that the Commission reconsider its previous position that the requirement of identifying information applies only to the originator of the message and not the transmitting entity.[107] In the situation where the transmitting entity, or fax broadcaster, determines the destination of the fax advertisement, that entity should also be required to include its identifying information on the fax, and the rules should be amended to reflect that requirement.

B. AUTODIALERS AND PRERECORDED MESSAGES

The Commission seeks comment on autodialers and prerecorded messages (NPRM ¶¶23-25). Advances in technology are allowing telemarketers to reach far more consumers than in the past. With a simple mouse-click, telemarketers can activate automatic dialing equipment that floods the country with unwanted live calls as well as unsolicited prerecorded messages. The telephone records subpoenaed for one autodialing telemarketer revealed the business was using 47 lines to leave messages that lasted less than 30 seconds. Considering that the calls could be placed over at least a 14-hour period, the equipment could leave more than half a million calls per week. In some cases, consumers have claimed that they could not disconnect from the call when the automatic message was being left. The immense scope of this activity is merely one example of the capacity of autodialer technology to intrude upon the privacy of our residents. A shocking use of this technology was seen by various state attorney general offices last spring when many of their own phone lines were barraged by prerecorded messages inviting the called party to call an 800 number to claim a travel package.[108] Similar messages were left on consumers' home phones as well.

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[107] Order on Further Consideration, 12 FCC Rcd 4609, ¶6 (1997).

[108] The Attorneys General of Illinois, North Carolina, and Tennessee received a rash of prerecorded messages on many of their office telephone lines between March and August, 2002. The calling party invited the

call recipient to telephone an 800 number to participate in Disney's 100th Anniversary celebration by visiting south Florida for a cost of $99 per person for three days.

Currently, at least thirty-three states have statutes that regulate autodialed calls and/or prerecorded messages.[109] Attorneys General have utilized these statutes to bring enforcement actions against violators who were leaving unsolicited, prerecorded commercial messages.[110] The Attorneys General have seen legal challenges waged against their state autodialer statutes, as well as the autodialer prohibition of the federal TCPA, on the grounds that the statutes are an illegal abridgement of the telemarketer's right to freedom of speech under the First Amendment.[111] However, both state and federal courts have found the challenges to be without merit.[112] Therefore, the force and effect of state statutes can and will be felt by abusive telemarketers if the states are left unfettered in their efforts to curb this form of telemarketing. The Attorneys General encourage the Commission to adopt rules that will enhance their enforcement efforts against these unwanted intrusions. The Attorneys General further encourage the Commission to engage in cooperative enforcement efforts on these matters with the states, but urge the Commission to avoid any efforts to preempt or block state action in this area.

C. PREDICTIVE DIALERS

The Commission seeks comment on predictive dialers (NPRM ¶¶15,26). Attorney General offices also have received complaints from consumers who are annoyed and frustrated when they answer phone calls which are silent on the other end. The silence is the result of a call placed by a predictive dialer system being "abandoned" because the telemarketer was not available to handle the call. The Commission correctly noted some of the problems with these devices (NPRM ¶15). The problems include the inability of the consumer to ask to be put on a do-not-call list, the

[109] States with laws regulating commercial autodialed and/or prerecorded messages include Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.

[110] See, for example, the actions by the North Carolina Attorney General: *State ex rel Cooper v. Carpet DryClean, Inc.,* 02 CVS 01247 (Wake County Superior Court), filed October 8, 2002; *State ex rel. Cooper v. Bluegreen Vacations Unlimited, Inc.*, 02CVS012207 (Wake County Superior Court), filed September 11, 2002; *State ex rel. Cooper v. Live Wire Systems, Inc. and James P. Davis*, 02CVS011713 (Wake County Superior Court), filed August 30, 2002; *State ex rel. Cooper v. Fax.com, Inc*., 02 CVS 007053 (Wake County Superior Court), filed May 30, 2002; and *State ex rel. Cooper v. Access Resource Services, Inc.*, 99CVS13248 (Wake County Superior Court), filed December 16, 1999. See also the action filed by the Illinois Attorney General: *People of the State of Illinois v. Live Wire Systems,*2002-CH-484 (Sangamon County Circuit Court, Illinois), filed October 10, 2002.

[111] *See Bland v. Fessler*, D.C. No. CV-94-07275 (D. Cal. 1994); *Moser v. FCC*, 826 F. Supp. 360 (D. Or. 1993); *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *Minnesota v. Casino Marketing Group, Inc.,* 475 N.W.2d 505 (Minn. App. 1991), *aff'd,* 491 N.W.2d 882 (Minn. 1996).

[112] *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009 (1996); *Moser v. FCC*, 826 F. Supp. 360 (D. Or. 1993), *rev'd by* 46 F.3d 970 (9th Cir. 1993), *cert. denied,* 515 U.S. 1161 (1995); *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *Minnesota v. Casino Marketing Group, Inc.,* 491 N.W.2d 882 (Minn. 1996).

annoyance of answering dead-air calls, the physical difficulty that senior citizens or the disabled may have in answering phones, and the fear that the call came from a potential burglar who is trying to find out if the resident is at home.

By setting some "acceptable" abandonment rate as the Direct Marketing Association suggests to its members (NPRM, n.101), the FCC would be blessing the interruptions that have contributed to the unprecedented consumer outrage leading to the current no-call database laws. Logically, persons engaged in telemarketing should not desire to alienate consumers. The consumers' time is just as valuable as that of the telemarketer. Accordingly, the Attorneys General strongly urge that a 0% rate of abandoned calls is the appropriate standard and should be the target and expectation of every company using a predictive dialer system.

D. ADEQUACY OF CURRENT DEFINITIONS

In paragraphs 23 and 24 of the NPRM, the Commission raises the issue of whether the current definitions in the TCPA and the Commission's rules should be redrafted in light of changes in technology. The Attorneys General believe that the current definition for automatic telephone dialing systems, which is "equipment which has the capacity to store and produce telephone numbers to be called using a random or sequential number generator to dial such numbers," appears to be sufficiently broad to withstand changes in technology. If the rules were modified at this point to specifically address the current technology, the rules would likely be outdated almost as soon as enacted due to the fast pace of the technical innovations in this field. Additionally, the case cited in fn.96 of the NPRM, *Kaplan v. Ludwig and Kustom Karpet Kleaners, Inc.,* was overruled by the Supreme Court of New York, Fourth Division.[113] The states can find no case in which a court has held that equipment using a computer database to dial numbers would not qualify as an "automatic telephone dialing system" under the TCPA.

E. TELEMARKETING CALLS TO WIRELESS TELEPHONE NUMBERS

The Commission seeks comment on issues related to telemarketing to wireless telephone numbers (NPRM ¶¶41-46). The Attorneys General believe that the Commission should prohibit all unsolicited commercial telemarketing calls that cause the recipient to incur a cost to receive the call. When a call is placed to a wireless telephone number, the recipient nearly always incurs a cost to receive the call. Such charge can be a per-minute charge or a reduction from a bucket of airtime minutes for which the recipient pays. As noted above, all telemarketing involves some cost-shifting in which the seller uses the potential customer's property (the telephone) to try to make a sale. In the case of wireless phones the cost-shifting is even greater because airtime charges are incurred by the potential customer. Several state legislatures regulate or have proposed regulation of commercial telemarketing calls to wireless phones.[114]

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[113] 286 A.D.2d 970 (N.Y. App. Div.), 730 N.Y.S.2d 765 (2001), *cert. denied,* ___ U.S. ___, 122 S. Ct. 2358 (2002).

[114] Arizona (Ariz. Rev. Stat. Ann. § 44-1278(B)(3)); California (Cal. Bus. and Prof. Code § 17590, *et seq.*);

In addition to cost concerns, telemarketing to wireless telephone numbers can pose safety risks because wireless telephone calls are sometimes answered when the wireless telephone owner is engaged in activities in which there is some risk associated with using a telephone, such as driving or working in industrial settings. Even though government safety officials caution against using a wireless telephone in such situations, the Commission should recognize the reality that some consumers will do so despite the risks. One reason why wireless users are more likely to answer their telephones is the belief that calls to wireless phones are more important and will not be telemarketing calls. The Commission should ensure that the consumer's expectations in this respect are met.

F. "INFORMATION ONLY" CALLS

Connecticut (Conn. Gen. Stat. § 52-570c); Illinois (Ill. Pub. Act No. 92-0795 (Aug. 9, 2002); S.B. 1637, 92nd G.A. (April 4, 2002)); Kentucky (Ky. Rev. Stat. § 367.46951); Maine (10 Me. Rev. Stat. Ann. § 1498 (prohibitions on calls placed by an automatic dialing device includes wireless telephone numbers); Minnesota (Minn. Stat. § 325E.26-.31 (2000)); New Jersey (2002 N.J. S.B. 153, 210th Legislature (September 26, 2002)); New York (NY CLS Gen. Bus. § 399-z (2002)); Tennessee (Tenn. Code Ann. § 47-18-1526(b)); Wyoming (Wyo. Stat. Ann. § 40-12-302(b)).

The Commission seeks comment on artificial and prerecorded messages that (1) purport to offer "free" goods or services, (2) purport to contain "information only," and (3) seek people to help sell or market a company's products, such as a "help wanted" message (NPRM ¶¶30-32).[115]

With respect to each of those examples, the application of the TCPA must turn not on the telemarketer's own characterization of the prerecorded message, but on the actual purpose of the initial prerecorded or artificial message. If the purpose of the commercial prerecorded message is to promote or sell goods or services, then it must be subject to the TCPA. This should not change simply because a marketer thinly disguises this purpose by claiming to provide "information only," claiming to offer free goods, or claiming to seek distributors for its products. If marketers could circumvent the TCPA merely by communicating "information only" or "free" goods in the prerecorded message, and saving the real sales pitch for the consumer's call in response to the message, the ban on prerecorded messages could be avoided so easily as to become a nullity. As discussed below, there can be no dispute that the TCPA and the Commission's rules -- in their current form -- already prohibit prerecorded messages that seek to sell or promote goods or services, including the examples cited by the Commission in paragraph 31.[116]

[115] *See* 47 C.F.R. § 64.1200(c)(1) & (2).

[116] Further, to the extent marketers have used those techniques (such as "information only" calls) to try to avoid the restrictions of Section 64.1200(e) (do-not-call list procedures), this comment also applies to show why those TCPA rules also cannot be avoided by superficial characterization of the purpose of calls.

As the Commission noted in the NPRM, "the [TCPA] and our rules clearly apply *already* to messages that are predominantly commercial in nature, and that [the Commission] will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself simply by inserting purportedly 'non-commercial' content into that message" (NPRM ¶33). That same approach demonstrates that commercial sellers cannot immunize prerecorded messages from the TCPA by claiming that the message lacks an "unsolicited advertisement." Congress intended that exemptions from the TCPA must be evaluated based on substance, not form.[117] The federal courts have followed that instruction, and declined to allow companies to avoid the TCPA by superficially claiming an exemption.[118] The TCPA itself makes clear that application of the statute should turn on the *purpose* of the phone contact.[119] Accordingly, the TCPA's ban on commercial prerecorded messages already applies to messages designed to sell goods or services, even if the message purports to be "information only" or offer free goods.

Nonetheless, it appears that certain telemarketers may attempt to circumvent the TCPA by improperly characterizing calls as "noncommercial" or by claiming the absence of an "unsolicited advertisement." For example, one for-profit seller of communications services has communicated prerecorded messages to residential numbers. The prerecorded message explains that an exciting launch of a revolutionary new product will soon take place, claims that the new product offers an opportunity to make a six-figure income, and encourages the recipient to attend a local meeting to learn about the opportunity. At the meeting, the seller encourages attendees to purchase an inventory of communications products for purposes of resale. In those circumstances, notwithstanding the purported offer of a business opportunity, the purpose of the prerecorded message is to sell commercial goods. Although the TCPA prohibits such commercial prerecorded messages, the commercial seller apparently likens the prerecorded message to a "help wanted" advertisement.

That example, like the "information only" and "free goods" messages noted by the Commission in the NPRM, highlights that certain telemarketers appear to be trying to exploit some perceived ambiguity with respect to the exemption in Section 64.1200(c)(2). The Commission could end such efforts to circumvent the TCPA and the Commission's rules by clarifying the definition of "unsolicited advertisement" in Section (f)(5). The Attorneys General recommend that the Commission import the purpose-based framework of the "telephone solicitation" definition to the

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[117] With respect to the exemption for callers with an established business relationship, Congress stated: "The Committee intends this (test) to be one of substance and not one of form." H.R. Rep. 102-317, *15, 102nd Congress (1991), 1991 WL 245201.

[118] *See Kenro, Inc. v. Fax Daily Inc.,* 962 F. Supp. 1162, 1171-72 (S.D. Ind. 1997) (refusing to accept that defendant's unsolicited faxes were non-commercial; although faxes contained editorial content in addition to advertisements, the purpose of the editorial content was to evade the TCPA); *Texas v. American Blastfax*, Inc. 121 F. Supp. 2d 1085, 1089 (W.D. Tex. 2000) (refusing to exempt a fax broadcaster who claimed it merely sent faxes for its clients, because "[i]t would circumvent the purpose of the TCPA").

[119] *See* 47 U.S.C. § 227(a)(3) & 47 C.F.R. § 64.1200(f)(3) ("telephone solicitation" includes "any telephone call or message *for the purpose of encouraging* the purchase or rental of, or investment in, property, goods or services") (emphasis supplied).

"unsolicited advertisement" definition. The term "unsolicited advertisement" should include *any material communicated for the purpose of encouraging the purchase or rental of, or investment in property, goods or services*. To the extent telemarketers perceived any ambiguity, this clarification would better serve consumers and business by clarifying that the TCPA applies to calls whose purpose is to sell something -- including commercial calls in the guise of "information only" calls, "free" give-aways, phony surveys, or "help wanted" calls.

G. THE EXEMPTION FOR PRERECORDED MESSAGES TO RESIDENCES BY OR ON BEHALF OF TAX-EXEMPT NONPROFIT ORGANIZATIONS

The Commission specifically seeks comment on "calls made jointly by nonprofit and for-profit organizations and whether they should be exempt from the restrictions on telephone solicitations and prerecorded messages" (NPRM ¶33). Currently there is an exemption for such prerecorded calls or messages "by, or on behalf of . . . a tax-exempt nonprofit organization." 47 C.F.R. § 64.1200(c)(4). *See also* Section 64.1200(f)(3) (excluding same from definition of "telephone solicitation" generally and thus from the do-not-call restrictions in Section 64.1200(e)); 47 U.S.C. § 227(a)(3)(C).

Prerecorded messages or telephone solicitations that serve to benefit for-profit companies, for instance, by proposing a commercial transaction with proceeds payable to a for-profit (whether in whole or in part), are *not* calls or messages "by or on behalf of tax-exempt nonprofit organizations." Such calls or messages are, and should remain, subject to the restrictions of the TCPA. No revision is necessary to apply the TCPA to calls or messages that solicit money payable to a for-profit. However, should the Commission determine it beneficial to clarify that the TCPA applies to marketing calls or messages by for-profits and to joint marketing efforts by for-profits and nonprofits, the exemption should be clarified to expressly not apply to calls or messages soliciting money payable to for-profit entities. If so clarified, the exemption in Section (c) should exempt:

> *a call or message by, or on behalf of, a caller . . . (4) Which is a tax-exempt nonprofit organization. This exemption shall not apply to calls or messages that solicit money payable to a person other than the tax-exempt nonprofit organization placing the call or message, or on whose behalf the call or message is placed*.

If the Commission deems a clarification beneficial, the same proviso ("This exemption . . . ") should be added to Section 64.1200(f)(3)(iii)(defining telephone solicitations to exclude calls "by or on behalf of a tax-exempt nonprofit organization").

Currently, some for-profit telemarketers use prerecorded messages to solicit money payable to the *for-profit* company, for goods and/or services sold by the for-profit company. We know that certain of these for-profit telemarketers, when investigated or challenged for these violations of the TCPA, claim protection under the nonprofit exemption. These for-profit telemarketers have aligned with nonprofit organizations (typically by contract), so that the telemarketers claim to be placing prerecorded commercial messages "on behalf of" the tax-exempt nonprofit organization. However,

although claiming that the prerecorded message is on behalf of the nonprofit (and thus purportedly exempt from the TCPA), in the telemarketing transaction generated by the message, the for-profit telemarketers solicit money *payable to the for-profit company*, not the nonprofit, for goods and/or services *sold by the for-profit company*. Such a prerecorded commercial message that generates a sale of goods or services, by a for-profit, cannot conceivably be entitled to an exemption under 47 C.F.R. § 64.1200(c)(4).

Yet in at least the field of "credit counseling,"[120] such TCPA violations have occurred on a massive scale. Most credit counselors are nominally tax-exempt nonprofit corporations (although many charge substantial monthly fees). Some nonprofit credit counselors have aligned with for-profit telemarketers that solicit new clients, and some of those telemarketers use prerecorded messages to contact prospects. By way of example, one for-profit telemarketer has communicated prerecorded voice messages to residential phone numbers, promising to reduce interest rates and save consumers money repaying their credit card debt. The prerecorded message did not disclose how the savings would be achieved and did not identify any nonprofit organization. If a caller responded to the 1-800 number on the message, the caller reached the for-profit call center. In the sales pitch that followed, the telemarketer described credit counseling services offered by a nonprofit organization. However, the telemarketer solicited "enrollment fees" (between $199-$499), payable entirely to the for-profit company. In a later version of its sales pitch, which also originated with a similar prerecorded message, the for-profit telemarketer sold "educational" materials, for hundreds of dollars. Once again, all money solicited was payable to the for-profit telemarketing company, not the nonprofit. Consumers interested in nonprofit credit counseling would be referred to a nonprofit credit counselor, but only after they paid hundreds of dollars to the for-profit marketing company.

For the for-profit telemarketer to claim the nonprofit exemption for the prerecorded message -- when it solicits money payable entirely to the for-profit -- is unsupportable. To so exalt form over substance would allow unfettered abuse of the nonprofit exemption[121] and undermine an essential purpose of the TCPA.[122] Put simply, when a prerecorded message solicits money payable to a for-

[120] Credit counselors, or debt adjusters, typically collect monthly payments from consumers and distribute payments to the consumer's creditors, after seeking to negotiate more favorable terms for the consumer, for instance, reduced interest rates or the waiver of penalties or late fees.

[121] Although no court has interpreted the TCPA nonprofit exemption, courts interpreting other TCPA exemptions have focused on substance over form, and declined to allow companies to avoid the TCPA by abusing its exemptions. *See Kenro, Inc. v. Fax Daily Inc.,* 962 F. Supp. 1162, 1171-72 (S.D. Ind. 1997) (refusing to accept that defendant's unsolicited faxes were non-commercial; although faxes contained editorial content in addition to advertisements, the purpose of the editorial content could have been to evade the TCPA); *Texas v. American Blast Fax*, *Inc.* 121 F. Supp. 2d 1085, 1090 (W.D. Tex. 2000) (refusing to exempt a fax broadcaster who claimed it merely sent faxes for its clients, because "[i]t would circumvent the purpose of the TCPA"). As stated above, Congress declared: "The Committee intends this [test] to be one of substance and not one of form." H.R. Rep. 102-317, *15, 102nd Congress (1991), 1991 WL 245201.

[122] *See* TCPA Order, 7 FCC Rcd 8773-74, ¶40 (TCPA primarily protects individuals from "unrestricted commercial telemarketing activity").

profit, not the exempted nonprofit, the message is not "on behalf of a nonprofit" and is not exempt from the TCPA.

The Attorneys General believe that the current exemption for tax-exempt nonprofit organizations generates no ambiguity with respect to for-profit or jointly sponsored marketing. Calls or messages that generate commercial sales for for-profit entities are subject to the TCPA. However, should the Commission determine it beneficial to clarify the nonprofit exemption, the Commission should reinforce that the exemption expressly does *not* apply to calls soliciting money payable to for-profit entities, rather than payable to the tax-exempt nonprofit organization.

This clarification would reinforce -- consistent with the legislative and regulatory history -- that the nonprofit exemption from the ban on prerecorded messages extends only to nonprofits.[123] To allow for-profits to continue to solicit money using prerecorded commercial messages undermines a precise purpose of the TCPA: to restrict commercial use of invasive prerecorded messages. It also, of course, would provide an unfair advantage to those for-profits that sell their products using banned prerecorded commercial messages, in relation to for-profit competitors that comply with the TCPA. In the NPRM, the Commission noted that "the [TCPA] and our rules clearly apply already to messages that are predominantly commercial in nature, and that [the Commission] will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself simply by inserting purportedly 'non-commercial' content into that message" (NPRM, ¶33).[124] That same ideal should govern when for-profit entities seek to align with

[123] Congress authorized the Commission to exempt: (1) non-commercial calls and (2) calls that the Commission determines (i) will not adversely affect the privacy rights that the TCPA is intended to protect *and* (ii) do not include the transmission of any unsolicited advertisement. 47 U.S.C. § 227(b)(2)(B). *See* 137 Cong. Rec. S18781-02, 102ND Cong., 1st Sess. (1991) 1992 WL 106397 (Cong. Rec.) (statement of Senator Hollings) ("The bill gives the FCC authority to exempt from these restrictions calls that are not made for a commercial purpose and categories of calls that . . . do not invade privacy rights."). Congress mentioned examples of certain telemarketing it intended to allow, such as calls "from their alma mater, from their favorite charity, from their newspaper or magazine about a lapsed subscription." 137 Cong. Rec. H11314 (statement of Rep. Richardson), 102ND Cong., 1st Sess., (1991), 1991 WL 250340 (Cong. Rec.). The Commission exempted prerecorded messages by nonprofits *because* it deemed them non-commercial: "[W]e conclude that tax-exempt nonprofit organizations should be exempt from the prohibition on prerecorded message calls to residences *as non-commercial calls*." TCPA Order, at 8774, ¶40 (emphasis supplied); *see id*. ¶5. The Commission thus exempted nonprofit messages, such as messages seeking charitable solicitations. There is no basis in the legislative or regulatory history to extend that exemption to for-profits in any manner. Indeed, exempting commercial messages that benefit for-profits would fall outside the regulatory authority delegated by Congress because such messages are commercial and they adversely affect the residential privacy rights that the TCPA is intended to protect. *See* 47 U.S.C. § 227(b)(2)(B).

[124] With respect to prerecorded and artificial messages, paragraph 33 of the NPRM raises the issue whether the nonprofit exemption from the ban on prerecorded messages should apply to nonprofit prerecorded messages that are commercial in nature, *i.e.*, that promote the sale of goods or services. Although the nonprofit exemption from "telephone solicitation" in Section 64.1200(f)(3) (exempting nonprofits from the Section (e)'s telemarketing restrictions) contemplates telemarketing calls by nonprofits selling goods or services, the nonprofit exemption from the ban on prerecorded messages is different. *See* 47 C.F.R. § 64.1200(a)(2) & (c)(4). *See also* 47 U.S.C. § § 227(a)(3) (defining "telephone solicitation"); 227(b)(1)(B) (banning commercial "telephone call[s]" using prerecorded messages) & 227(b)(2)(B) (authorizing FCC to craft exemptions to prerecorded message ban). With respect to prerecorded messages, the Commission exempted *non-commercial* messages by nonprofits. *See* TCPA

nonprofits in order to circumvent the TCPA: prerecorded messages that propose commercial sales that benefit for-profit companies are predominantly commercial, and for-profits cannot immunize those commercial messages because they are associated with, or share proceeds with, nonprofit organizations.

IV. CONCLUSION

The Attorneys General continue to view unsolicited telemarketing calls as a serious problem affecting many consumers, and an invasion of privacy when consumers desire not to be contacted in their homes. Unwanted telemarketing calls are a continuing intrusion into the privacy of those consumers who do not wish to receive such calls. That consumers strongly desire sovereignty over their homes against unwanted telemarketing intrusions is abundantly clear. Based on the responses in states that have adopted do-not-call database systems, the Attorneys General encourage the Commission to anticipate a significant response to a national database, particularly from residents of states that have not yet implemented their own databases. We urge the Commission to view consumers' desire for privacy in their homes as paramount as it pursues the establishment of a national do-not-call registry and works with our offices to ensure a consumer-friendly database system that respects the sovereignty of states in enacting and enforcing their own laws.

Order, ¶ 5 ("we exempt from the prohibition on prerecorded and artificial voice message calls to residences . . . *non-commercial calls* by tax-exempt nonprofit organizations.") (emphasis supplied); *see also* NPRM ¶ 33 ("the Commission concluded that calls by tax-exempt nonprofit organizations also should be exempt from the prohibition on prerecorded messages to residences as non-commercial."). This made sense because prerecorded messages selling goods or services are commercial and invade residential privacy, whether the sales messages are generated by a nonprofit or a for-profit. *See* 47 U.S.C. § 227(b)(2)(B). To address the issue of joint for-profit/nonprofit marketing raised by the Commission, with respect to prerecorded messages, the Commission could clarify the nonprofit exemption consistent with its regulatory history. For prerecorded messages (not all "telephone solicitations"), the Commission could clarify that the nonprofit exemption in Section (c)(3) applies only to prerecorded message calls *made by or on behalf of tax-exempt nonprofit organizations, provided that such calls do not propose or solicit the sale of goods or services*. This clarification is consistent with the Commission's original exemption and advances an essential purpose of the TCPA: to restrict *commercial* prerecorded messages. This clarification also would address the issue (discussed above) of for-profit companies that use prerecorded messages to sell their own goods or services but wrongly seek exemption from the TCPA because they are somehow aligned with a nonprofit.

We also encourage the Commission to consider our recommendations to enhance the rules governing unsolicited advertising and proscribe the deceptive practices of fax broadcasters, predictive dialers, autodialers, and joint for-profit/not-for profit arrangements. In addition, we urge the Commission to treat information-only calls as solicitations and ban telemarketing calls to cellular telephones. By augmenting and improving the rules governing unsolicited advertising, the Commission would further our mutual consumer protection interests.